

87-1511
No. _____

Supreme Court, U.S.

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In the Supreme Court of the United States

October Term, 1987

BUEL H. NEECE,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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BUEL H. NEECE*

March, 1988

3011



QUESTIONS PRESENTED

1. Whether or not the Internal Revenue Service can obtain a conviction for criminal tax evasion, consistent with the United States Constitution, without proving the taxpayer's income and income tax liability.
2. Whether or not the Internal Revenue Service is entitled to any presumption in favor of a criminal tax evasion indictment, which the taxpayer must rebut to avoid conviction.
3. Whether or not a criminal proceeding is rendered fundamentally unfair by the trial court's refusal to permit expert testimony which would negate a requisite element of the Internal Revenue Service's charge.
4. Whether or not a criminal proceeding is rendered fundamentally unfair by the trial court's refusal to permit the taxpayer to impeach the Internal Revenue Service's expert witness through independent authorities.

PARTIES TO THE PROCEEDINGS BELOW

The parties appearing in the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Northern District of Oklahoma, were Buel H. Neece and the United States of America.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BUEL H. NEECE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit entered October 22, 1987, *United States of America v. Buel H. Neece*, No. 86-1633 (10th Cir. 1987), is included as Appendix A. The Order of the Court of Appeals for the Tenth Circuit denying Buel H. Neece's Petition for Rehearing and Suggestion of Rehearing En Banc, entered January 13, 1988, is included as Appendix B.

A grand jury indictment, alleging three counts of income tax evasion, was filed in the United States District Court for the Northern District of Oklahoma, United States of America vs. Buel H. Neece, No. 35-CR-161-C, on November 7, 1985. The indictment is included as Appendix C. A jury verdict form finding Buel H. Neece

guilty on all three counts of the indictment was filed March 5, 1986, and is included as Appendix D.

JURISDICTIONAL BASIS OF THIS PETITION FOR WRIT OF CERTIORARI

The Petitioner seeks, by Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, review of the judgment of that court entered on October 22, 1987 (Appendix A, infra).

The Court of Appeals for the Tenth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc on January 13, 1988 (Appendix B, infra). There has been no Order granting an extension of time within which to petition for certiorari.

Jurisdiction for this Court to review the judgment in question is believed to be conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 26 U.S.C. § 7201, provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF FACTS

Buel H. Neece is in his early 60's. He has a 10th grade education and worked primarily in the Land Department of Texaco, Inc. for 27 years. In 1975, he began a one-man operation as an oil and gas lease broker. Over the next six years, he expanded his brokerage operation to the point that he employed in excess of 160 people.

During the height of the oil and gas boom in Oklahoma, Neece's business grew at a chaotic rate, and he placed great reliance on his staff and others he employed to assist him. Neece specifically relied on his accountant, Ralph Williams, to maintain accurate books and records of his business and to prepare Neece's federal income tax returns.

Buel Neece was indicted by a grand jury in the Northern District of Oklahoma for willful evasion of income taxes for the years 1979, 1980 and 1981. Neece was tried to a jury, with the Government's case resting principally on the testimony of Neece's accountant for the years in question, Ralph Williams. Neece was convicted on all counts of the indictment, and was sentenced to five years imprisonment and a \$10,000.00 fine on each count. The prison confinement was suspended, and Neece was placed on probation for five years for each count of the indictment.

Neece appealed his conviction to the United States Court of Appeals for the Tenth Circuit. The Circuit Court, in a panel decision, upheld the trial court. A Petition for Rehearing and Suggestion for Hearing En Banc was subsequently denied.

BASIS OF FEDERAL JURISDICTION

The grand jury indictment against Buel H. Neece for violation of 26 U.S.C. § 7201 was tried to a jury sitting in the United States District Court for the Northern District of Oklahoma.

The final judgment of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §§ 1291, 1294.

REASONS FOR GRANTING THE WRIT

The fundamental error committed by the Trial Court strikes at the very essence of Defendant Neece's constitutional rights.

Neece's rights to a fair trial are embodied, inter alia, in *Henderson v. Kibbe*, 331 U.S. 145, 153, 52 L.Ed.2d 203, 211, 97 S.Ct. 1730, _____ (1977):

The Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U S 364, 25 L Ed 2d 368, 90 S Ct 1068, 51 O Ops 2d 323.

One of the criminal defendant's fundamental rights is a full and free opportunity to defend himself through his own witnesses and through cross-examination of the government witnesses, as held in *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 35 L.Ed.2d 297, 308, 93 S.Ct. 1038, _____ (1973):

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 33 US 257, 273, 92 L Ed 682, 68 S Ct 499 (1948), identified these rights as among the minimum essentials of a fair trial:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

See also *Morrissey v. Brewer*, 408 US 471, 488-489, 33 L Ed 2d 484, 92 S Ct 2593 (1972); *Jenkins v. McKeithen*, 395 US 411, 428-429, 23 L Ed 2d 404, 89 S Ct 1843 (1969); *Specht v. Patterson*, 386 US 605, 610, 18 L Ed 2d 326, 87 S Ct 1209 (1967).

Neece was charged with attempting to evade or defeat his federal tax contrary to 26 U.S.C. § 7201. To obtain a conviction, the Government must prove beyond a reasonable doubt each and every element of a § 7201 violation, including both a willful failure to report income and that there is a tax due and owing from the Defendant for the years in question. The Government's charge must fail if it does not carry that burden of proof. See *Lawn v. U.S.*, 355 U.S. 339, 361, 2 L.Ed.2d 321, 336 (1958); *Sansone v. U.S.*, 380 U.S. 343, 351, 13 L.Ed.2d 882, 888 (1965). The Government failed to carry this burden of proof in these proceedings, and Neece was prohibited by the Trial Court from introducing expert testimony that would have graphically revealed the fatal fundamental flaw in the Government's case.

Neece, as a criminal defendant, has an absolute constitutional right to present any defenses recognized at law or in equity and supported by admissible evidence. A trial judge has neither right nor privilege to impose upon a criminal defendant his own single-minded and mistaken theory of the case, thereby requiring the defense to proceed on that limited basis. A trial court's discretion to admit or to prohibit evidence does not include the latitude to dictate to the defendant how he must conduct an otherwise valid defense.

In this case, the Trial Court prohibited admission of testimony and exhibits by Neece's summary expert witness which were material and relevant to proving that Neece did not willfully underreport income and evade his federal tax. This expert testimony would, in addition, have clearly shown to the jury that, under the Government's own method of accounting, the tax liability charged against Neece was nonexistent. The Trial Court's rulings permitted the Government to attempt to prove its case against Neece by a hybrid method of accounting not supported by its own evidence, and at the same time denied Neece any meaningful opportunity to rebut that evidence, incredibly on the grounds that it was Neece

who was attempting to change the accounting method. The Trial Court thus permitted this case to go to the jury after two weeks of trial and the introduction of over 100 exhibits, many of which involved tabulations and computations based upon hundreds of separate documents, all summarized in six hours of Government expert testimony. The jury never got to hear Neece's corresponding expert testimony on these very same matters. By allowing the Government to summarize its complex case, and requiring Neece to go to the jury only on unsummarized testimony and hundreds of documents, the Trial Judge committed egregious and reversible error. If justice and fair play are to be preserved in the criminal courts of this land, then such a fundamentally flawed proceeding cannot be permitted to stand.

The Government charged Neece with underreporting his business-related income and evasion of income tax for 1979, 1980 and 1981. To prove its case, the Government subpoenaed checks from those who had paid Neece for his business services, and obtained 1,026 such checks allegedly paid to Neece during the three years in question. The Government's own witness testified that these checks were all of Neece's business-related income (Tr. Vol. 7, pp. 18-21, 30).

The Government's principal witness was Neece's accountant during the years in question, Ralph Williams. Accountant Williams testified that he used a bank deposits method of accounting for Neece, so that a check became reportable income when it was deposited to Neece's operating account (Tr. Vol. 1, pp. 27-28, 78-79; Tr. Vol 2, p. 66). Neece's bookkeeper testified that interest, dividends, rents, and bank transfers were also included in deposits to the operating account.

The Government, having all of Neece's business income represented by the 1,026 checks, then determined that 303 of these checks had not been deposited to the operating account. The

remaining 723 checks were deemed to have been so deposited. The Government then incorrectly assumed that the total amount of those 723 checks would equal the Schedule C— Business Related Gross Income as reflected on Neece's 1979, 1980 and 1981 Federal Tax Returns, as prepared by accountant Williams (Plaintiff's Exhibits 1, 2 and 3). Thus, the Government used the Schedule C figures for the years in question, and claimed that Neece had underreported his income by an amount equal to the 303 checks not deposited to the operating account (Tr. Vol. 7, pp. 24-25, 27-29, 32-33, 37-38, 50, 60, 79-82).

The fatal flaw in the Government's case was that the 723 deposited checks did not in fact equal the business related income reported on Neece's tax return, but rather the tax returns showed substantially more income. This was the grounds of Neece's defense: (1) Neece testified that he had informed his accountant of all of his income including items that were not in fact deposited to his operating account, and (2) further that the accountant had included these funds not so deposited in Neece's income for 1979 through 1981, so that the returns stated more income than the total of the income deposits to the operating account.

These facts had vital significance in two respects. First, if Neece had provided his accountant with full information about all of his income, and had relied upon the accountant to correctly prepare his returns, he could not have been properly found to have willfully evaded his federal tax obligation. In fact, since the income tax returns reported substantially more income than the 723 deposited checks, the difference could only have been attributable to the accountant's including on the returns income other than that deposited to the operating account. Since the only evidence of other income produced by the Government was the 303 undeposited checks, the jury should have been provided with this explanation as reasonable grounds upon which to conclude that Neece had in fact reported the income

represented by those 303 checks and that the accountant had attempted to reflect that undeposited income on the returns. Such a conclusion would have negated the element of willfulness, inasmuch as Neece's reliance upon his accountant to whom he had provided complete information about his income is a well-recognized defense to willful tax evasion. *U.S. v. Samara*, 643 F.2d 701 (10th Cir. 1981); *U. S. v. Dowdell*, 446 F.2d 145 (10th Cir. 1971). In fact, accountant Williams was not even able to determine how else he might have arrived at the Schedule C income figure (Tr. Vol. 2, pp. 26-28; Vol. 6, pp. 74-76; Vol. 8, pp. 22, 28). Neece's expert accounting witness would have given testimony from which the jury could properly determine that the accountant had used "plugged" or invented figures for preparing the tax returns; therefore, the Government's claim that Neece had income equal to the tax return figures plus the 303 checks was not supported by the Government's own evidence and its asserted method of accounting. Nonetheless, the Trial Judge gutted the viability of this defense by refusing to permit Neece's accounting expert to so testify (Tr. Vol. 9, pp. 99-102). This error was compounded when the Government, in closing argument, falsely represented to the jury that these checks were not all of Neece's income (Tr. Vol. 9, pp. 180-81).

The second element fundamental to Neece's theory of defense was that the Government had used a hybrid method of accounting to compute Neece's tax deficiency on alleged income substantially greater than its own evidence and actual knowledge of what 100% of Neece's total business income was for these years (the 1026 checks). During the trial, the Government continuously represented to the Court and to the jury, up through closing arguments, that it did not have 100% of all of Neece's income (Tr. Vol. 9, pp. 180-81). This was an absolute falsehood, contrary to the express testimony of the Government's agents that they had in fact obtained all of Neece's income in the 1,026 checks (Tr. Vol.

7, pp. 18-21, 30). Since the checks attributable to each year in question, and deposited to the operating account, failed by substantial amounts to equal the income stated on the tax returns, an alleged tax deficiency computed on the tax return figures plus the undeposited checks was unsupported by the Government's evidence. The jury should have been allowed the benefit of Neece's summary expert to have this evidence clearly and concisely summarized and put before them.

An integral element in computing Neece's actual income was identification of income checks dated late in the year and deposited in the first two weeks of the subsequent year. The Trial Judge specifically refused, over repeated requests, to allow testimony or the introduction of a summary schedule reflecting this correct analysis of checks not deposited in the year written and representing Neece's income which should have been shown in his tax returns.

The prejudice which resulted to Neece was either overlooked or completely misconstrued in the panel decision of the Court of Appeals. An essential element of the Government's entire case was based on a deposits method of accounting, allegedly used by accountant Williams, to determine income in each given year. The 1,026 checks obtained by the Government were broken down into categories of deposited and undeposited checks for each of the years 1979 through 1981. Neece's expert, however, determined from a review of the 723 checks deposited that a substantial amount of money attributable by the Government to each of the years in question was in fact not deposited to the operating account until the following year. This essential piece of evidence was clearly reflected by deposit slips introduced by Neece (Defendant's Exhibits 29-A, 29-B, 29-C and 29-D). The failure of the Government to utilize the actual checks, which it possessed, and instead to use tax returns which overstated the income deposited flaws the Government's proof beyond redemption. These miscalculations by the Government

based on yearly deposits, but in fact supported by 303 checks and tax returns which could not be verified.

Neece's expert attempted to testify regarding the mixed method of accounting used by the Government to distort Neece's actual income, but which evidence was excluded by the Trial Judge (Tr. Vol. 9, pp. 82-91, 110-114). The Court of Appeal's panel decision upheld the Trial Court's ruling on the basis that Neece's expert was attempting to show his income on an accounting method other than that which Neece actually used. This conclusion is uncontroversibly erroneous. The Trial Judge's complete inability to comprehend the accounting issues involved and the deposits method of accounting for income prevented the Trial Judge from realizing that the Government had in fact employed a change of accounting methods to overstate Neece's income and tax liability. The Trial Judge's misinterpretation of the accounting issues, upheld by the Court of Appeal's panel decision, was purportedly founded on the criticism that Neece's expert had not analyzed each and every deposit to the operating account. In fact, neither had the Government. It was the Government's case that the 723 deposited checks, allocated out to the years in question, had in fact been deposited in those years. Neece was denied the opportunity to show the jury that substantial amounts of money so represented in the Government's case had not in fact been deposited in the years which the Government claimed, with the resulting distortion of income for each particular year. This distortion, combined with the overstatement of alleged income derived from the tax returns, if corrected, would have completely extinguished the claimed tax deficiency for 1979 and 1980, and vastly reduced the claim for 1981. The Trial Judge's accounting deficiencies resulted in Neece being convicted for willful tax evasion for years in which no tax was due.

CONCLUSION

Buel Neece was charged by the Government with willfully evading federal income tax. In the history of American criminal proceedings, it has long been recognized that the prosecution has an enormous advantage in resources and manpower over the individual charged, who is left to defend himself as well as he may. In order that the Government's awesome power will not be abused, the defendant is presumed innocent, and cannot be successfully prosecuted without the Government's carrying its burden of proof, guilt beyond any reasonable doubt.

In a charge of income tax evasion based on underreporting of income, it is incumbent upon the Government to prove the actual amount of the defendant's income. In this case, the Government and the Trial Court perverted every established principle of constitutional right which should have been available to Buel Neece. The Government's agents testified and presented documentary evidence of what Buel Neece's total income actually was. Yet the prosecutor was repeatedly permitted to represent to the Court and the jury that Neece's income was actually much greater, without any factual support. Instead, the Government revolved its case around tax returns prepared by Neece's incompetent accountant. Neither the accountant nor the Government was ever able to establish where the income figures reported in the tax returns actually came from.

In addition, the Government applied a mixed system of accounting to distort the amount of income shown by the only actual evidence it ever presented of Neece's income. The only plausible way in which that unsupportable approach to the prosecution could be rebutted was to show that the Government had not applied the system of accounting which it purported to use. Such a showing by Neece necessarily involved demonstration of the Government's

change of accounting systems. Yet Neece was precluded by the Trial Judge from so attacking the Government's fatally flawed case.

Simply stated, this was not a constitutionally permissible criminal proceeding—it was a travesty. Buel Neece was convicted of income tax evasion for years in which the Government failed to prove his income was more than reported, and for which, under the Government's own evidence, there was no tax liability. Neece respectfully requests this Court to vindicate the gross disregard of his constitutional privileges and to set aside the criminal convictions entered against him.

Respectfully submitted,

HOUSTON AND KLEIN, INC.

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CERTIFICATE OF SERVICE

I, E. John Eagleton, a member of the Bar of the Supreme Court of the United States and counsel of record for Buel H. Neece, Petitioner, hereby certify that on the _____ day of _____, 1988, pursuant to Rule 28 of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the United States of America, by mailing the copies in duly addressed envelopes, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

E. John Eagleton
Counsel for Petitioner



A P P E N D I X A

[filed Oct. 22, 1987]

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.) No. 86-1633
)
BUEL H. NEECE,)
Defendant-Appellant.) -

Appeal from the United States District Court
For the Northern District of Oklahoma
(D.C. No. 85-CR-161-C)

E. John Eagleton, Thomas G. Potts, Marc F. Conley and Charles D. Harrison of Houston and Klein, Inc., Tulsa, Oklahoma for Plaintiff-Appellee.

Layn R. Phillips, United States Attorney, Northern District of Oklahoma, for the Defendant-Appellant.

Before BARRETT, McWILLIAMS AND BALDOCK, Circuit Judges.

[APPENDIX]

BALDOCK, Circuit Judge

Defendant-Appellant Neece was convicted of three counts of willfully attempting to evade or defeat his federal income taxes for the years 1979, 1980, and 1981, in violation of 26 U.S.C. § 7201. Defendant was fined \$10,000 for each count. He was also sentenced to five years in prison on Count I, with the execution of sentence suspended and defendant placed on probation for five years. The sentences were also suspended on Counts II and III, and defendant was placed on probation for five years as to each count. He appeals his conviction, arguing that (1) the trial court erred in sustaining objections to certain testimony and evidence offered by defendant through his expert accounting witness, and (2) he was denied a fair trial due to certain comments made by the prosecutor in his closing argument. We reject each of defendant's contentions and affirm the judgment of the trial court.

We first address defendant's contention that the trial court erred in sustaining objections to certain testimony and evidence offered through his expert accounting witness. A determination as to the admissibility of expert testimony is within the sound discretion of the trial court, and such determination will not be disturbed absent a clear abuse of that discretion. *United States v. Barton*, 731 F.2d 669, 672 (10th Cir. 1984).

Defendant's first contention regarding the expert witness evidence pertains to his asserted defense of reliance upon his accountant to properly maintain his books and records and to properly prepare his income tax returns. He claims that the trial court's refusal to allow his expert to testify as to the incompetence of the accountant who prepared his returns, as well as to the methods and computations of that accountant, was prejudicial to his theory of defense.

Defendant's objections center on the trial court's sustaining of the government's objections to the following questions: (1) "Based upon that testimony [regarding the accounting system set up by defendant's accountant], what shortcomings if any do you see in that system, sir?", rec. vol. X at 99, and (2) "With respect to defendant's exhibit 1 [general ledger runs performed by defendant's accountant], did you notice any errors in connection with that particular document, sir?", id. at 102. The government objected to both questions on relevance grounds, and both objections were sustained by the trial court.

The record reveals that the district court did not abuse its discretion in sustaining the government's objections. The questions at issue were simply too broad to withstand an objection as to relevance. In his brief on appeal, defendant lists several points that he was attempting to elicit from the expert, and explains the relevance of each. But the questions put forth at trial do not focus on those specific points that defendant now claims he was intending to raise. The questions instead call for a recitation of every possible problem or mistake that the defendant's expert perceived in defendant's accountant's systems and methods. Such a broad, unfocused critique, without reference to the specific issues presented at trial, would be irrelevant. The trial court's sustaining of the government's objections simply ensured that such a litany of irrelevant information did not occur. The court's actions in no way precluded defendant from presenting the relevant aspects of his expert's testimony by way of a more focused examination, and thus did not preclude him from presenting his theory of defense. Perhaps if defendant had made a formal offer of proof, Fed. R. Evid. 103(a)(2), any relevant evidence which these questions might have elicited would have come to the attention of the court.

The adequacy of the lower court's ruling as to these two specific questions, as well as the lack of prejudice actually suffered

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by defendant, are supported by the fact that the expert did testify to several of the matters deemed relevant by defendant in his brief. Although defendant claims prejudice due to the trial court's "exclusion" of his expert testimony, our review of the record reveals that the expert was allowed to testify as to the issues involved in this case when such testimony was elicited by properly focused questions. The expert testified as to errors appearing on the face of the returns for the years in question, rec. vol. X at 115-19, and to transfers from the trust account to the operating account, Id. at 96-99. He rendered an opinion as to the correctness of the gross receipts figures as included on the tax returns for the years in question. Id. at 119-25. Sustaining objections to the above-quoted questions was not just a blanket exclusion of the expert's opinion testimony which precluded the defendant from presenting his defense. Rather, the court simply sustained objections to overly broad questions that might well have injected irrelevant testimony, while allowing the relevant expert testimony when elicited by properly focused questions.

Defendant's second contention concerning the expert witness evidence relates to his proposed use of the expert as a summary expert on the federal taxes owed by defendant for the years in question. Defendant again points to the trial court's sustaining of the government's objections to the quoted questions as an exclusion of expert testimony resulting in prejudice to him. As noted above, we do not view the trial court's actions as an exclusion of the expert's testimony, but rather as a reaction to the two overly broad questions. The expert was permitted to give his opinion as to what figures should have been used for gross receipts in the various tax returns. Id. We therefore conclude that the expert was allowed to present his relevant testimony in response to properly framed questions, and that the trial court did not abuse its discretion in sustaining objections to the two questions.

Defendant next contends that the trial court erred in excluding evidence which would have shown that he had no tax due and owing for the years 1979 and 1980, and substantially less tax due and owing for 1981 than asserted in the indictment. Specifically, defendant objects to the district court's refusal to allow into evidence several schedules prepared by defendant's expert and the expert's testimony pertaining to those schedules. The schedules listed amounts paid to defendant by various oil companies, categorizing such payments by the date the checks were issued. Defendant asserts that this evidence was necessary in order to demonstrate his true income each year, and thereby show the amount by which defendant's accountant overstated his income in each of the years relevant to this case. The district court concluded that, because the schedules were based upon the dates the checks were issued rather than the date they were deposited (and thus deemed income by defendant's accountant) they were not relevant to the case.

Defendant asserts that the schedules were relevant in that they show 100% of the amount paid to him by the oil companies in any given year. In the schedules, defendant's expert would take those checks issued but not deposited in a given year and subtract them from the total amount paid by the oil companies. The remaining amount would be, according to defendant, his income that particular year.

Our review of the record and defendant's asserted method of calculating income leads us to conclude that the district court did not abuse its discretion in refusing to allow into evidence the schedules and the testimony pertaining thereto. While defendant's theoretical method of calculating income may be no worse than some other method, its major flaw, for admissibility purposes, is that it simply is not the same method of reporting income used by defendant's accountant in determining his federal tax liability. There is no evidence that the method urged by defendant was actually used

[APPENDIX]

by the accountant to determine income. Defendant's accountant claimed to have calculated income based upon deposits into the operating account in a given year, rather than a "checks issued less checks not deposited until next year" method. Even if defendant's asserted method of calculation might have been a proper or more accurate alternative, it would still not be relevant here.

Defendant claims that he was attempting to show that, even under the method of accounting employed by defendant's accountant, he had less tax due and owing for the years in question than charged in the indictment. This argument can only succeed if defendant indeed replicated the method of accounting used by defendant's accountant, i.e., reporting income based on deposits to the operating account. This approach would require an analysis of all of the deposits made into the account, an analysis which defendant's expert admitted he did not make. Rec. vol. X at 93. Defendant's method of summarizing the checks issued by the oil companies would not serve as an adequate substitute for actually analyzing and reconciling the checks and deposits in order to determine whether each was, or should have been, reported as income. The trial court did not abuse its discretion in refusing to allow defendant to attempt to show a lesser tax liability by employing a method of reporting income different than that used in preparing the return. See *United States v. Lisowski*, 504 F.2d 1268, 1275 (7th Cir. 1974).

Defendant's final argument on appeal is that he was denied a fair and impartial trial by improper remarks made by the prosecutor in his closing argument. Defendant asserts that the prosecutor improperly interjected his personal opinion as to the veracity of the witnesses and made improper reference to the fact that one of the government's witnesses, defendant's accountant, was dying of cancer. Where, as here, there is no timely objection to the alleged misconduct, the reviewing court must evaluate the case by viewing the claim of prosecutorial misconduct against the entire record in

order to assess the seriousness of the claimed error. *United States v. Young*, 470 U.S. 1, 16 (1985).

Our review of the record indicates that the comments that defendant complains of represent nothing more than a submission of the issue of credibility to the jury. The comments did not constitute a statement of the prosecutor's personal belief regarding the veracity of the witnesses, and did not result in defendant being denied his right to a fair trial. See *United States v. Lotspeich*, 796 F.2d 1268, 1272 (10th Cir. 1986).

AFFIRMED.

APPENDIX B

JANUARY TERM—JANUARY 13, 1988

Before the Honorable William J. Holloway, Chief Judge, The Honorable Monroe G. McKay, The Honorable James K. Logan, The Honorable Stephanie K. Seymour, The Honorable John F. Moore, The Honorable Stephen H. Anderson, The Honorable Deanell R. Tacha, The Honorable Bobby R. Baldock, The Honorable Robert H. McWilliams and The Honorable James E. Barrett, Circuit Judges.

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
) No. 86-1633
BUEL H. NEECE,)
Defendant-Appellant.)

This matter comes on for consideration of appellant's petition for rehearing, with suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

(s) ROBERT L. HOECKER, Clerk



A P P E N D I X C

[filed Nov. 7, 1985]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) No. 35-CR-161-C
)
BUEL H. NEECE,)
Defendant.)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 24th day of November, 1980, in the Northern District of Oklahoma, BUEL H. NEECE, a resident of Sperry, Oklahoma, who during the calendar year 1979 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1979, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Northern District of Oklahoma, a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$86,329.00 and that the amount of tax due and owing thereon was the sum of \$31,312.00, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$175,237.00, upon which said taxable income there was owing to the United States of America an income tax of \$76,842.00, in violation of Section 7201, Internal Revenue Code; and Title 26, United States Code, Section 7201.



[APPENDIX]

COUNT II

That on or about the 17th day of June, 1981, in the Northern District of Oklahoma, BUEL H. NEECE, a resident of Sperry, Oklahoma, who during the calendar year 1980 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1980, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Northern District of Oklahoma, a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$204,681.00 and that the amount of tax due and owing thereon was the sum of \$98,148.00, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$374,617.00, upon which said taxable income there was owing to the United States of America an income tax of \$212,246.00, in violation of Section 7201, Internal Revenue Code; and Title 26, United States Code, Section 7201.



COUNT III

That on or about the 1st day of October, 1982, in the Northern District of Oklahoma, BUEL H. NEECE, a resident of Sperry, Oklahoma, who during the calendar year 1981 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1981, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Northern District of Oklahoma, a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of \$362,954.00 and that the amount of tax due and owing thereon was the sum of \$195,742.00, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of \$1,162,100.00, upon which said taxable income there was owing to the United States of America an income tax of \$598,086.00, in violation of Section 7201, Internal Revenue Code; and Title 26, United States Code, Section 7201.

A TRUE BILL

LAYNE R. PHILLIPS
United States Attorney

(s) Kenneth P. Snoke
Assistant U. S. Attorney

(s) Hilary H. Cunningham, Jr.
Foreman



APPENDIX D

[filed March 5, 1986]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
 Plaintiff,)
)
 vs.) No. 85-CR-161-C
)
)
BUEL H. NEECE,)
 Defendant.)

VERDICT FORM

We the Jury, empaneled and sworn in the above-entitled and numbered case, find the defendant, Buel H. Neece:

- Not Guilty
X Guilty as Charged in Count 1 of the Indictment
 Not Guilty
X Guilty as Charged in Count 2 of the Indictment
 Not Guilty
X Guilty as Charged in Count 3 of the Indictment

March 5, 1986

(Date)

(s) Charles L. Bowerman

(Foreman)